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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1159

SOUTHERN PACIFIC COMPANY, *et al.*,
Appellants,

—v.—

UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JURISDICTIONAL STATEMENT

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Dated: February 26, 1968

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
Statement of Reasons Why the Questions Presented Are Substantial	9
The Commission Did Not Retain Jurisdiction To Modify Conditions (a)-(e)	12
The Commission Did Not Give Adequate Reasons Or Basis For Reversing Its Determination Of Four Years Earlier, On An Identical Record, That Condition (e) Continued To Be In The Public Interest And Just and Reasonable	17
The Pacific Railroad Acts Require CP and UP To Solicit And Route Preferentially Each Other's Line	24
The Preferential Solicitation And Preferential Routing Provisions Of The 1924 Agreement Are Not Violative Of The National Transportation Policy Or Section 3(4) Of The Act	30
Conclusion	36

AUTHORITIES

Cases:

Baltimore & O.R.R. v. *United States,* 386 U.S. 372 (1967) 13, 19, 23

Burlington Truck Lines, Inc. v. *United States,* 371 U.S. 156 (1962) 2, 20

PAGE

Chicago Junction Case, 71 I.C.C. 631 (1922) 15
Control of Central Pacific by Southern Pacific, 76 I.C.C. 508 (1923) ..... Passim
Control of Central Pacific by Southern Pacific, 317 I.C.C. 469 (1962) ..... Passim
Control of Central Pacific by Southern Pacific, 328 I.C.C. 345 (1966) ..... Passim

Denver & R.G.W. R.R. v. *ICC*, 229 F. Supp. 249 (D. Col. 1964) 8, 18
Detroit, T. & I. R. Co., Control, 275 I.C.C. 455 (1950), sustained *sub nom. New York, C. & St. L. R.R.* v. *United States*, 95 F. Supp. 811 (N. D. Ohio 1951) 15

Norfolk & W. Ry. Co. Merger, 307 I.C.C. 401 (1959) 15
Northeast Airlines, Inc. v. *CAB*, 331 F.2d 579 (1st Cir. 1964) 23

Penn-Central & N.&W. Inclusion Cases, 36 U.S.L.W. 4093 (U.S. Jan. 16, 1968) 15

SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 20
Southern Pacific Co. Merger, 307 I.C.C. 806 (1959) 9

Toledo, P. & W. R. Co. Control, 295 I.C.C. 523 (1957), sustained *sub nom. Minneapolis & St. L. Ry.* v. *New York, C. & St. L. R.R.*, 165 F. Supp. 893 (D. Minn. 1958), *aff'd*, 361 U.S. 173 (1959) 33

Union Pacific Ry. v. *Chicago, R.I. & P. Ry.*, 163 U.S. 564 (1896) 30
United States v. *Southern Pacific Co.*, 259 U.S. 214 (1922) 3, 26
United States v. *Southern Pacific Co.*, 290 Fed. 443 (D. Utah 1923) 7

PAGE

United States v. *Union Pacific R.R.*, 188 Fed. 102 (D. Utah 1911) 23

United States v. *Union Pacific R.R.*, 226 U.S. 61 (1912) 23, 25, 26, 30

Statutes:

Administrative Procedure Act, 5 U.S.C.:
Section 557(c) 10, 17

Emergency Railroad Transportation Act of 1933, Section 204, 49 U.S.C. § 5a 31

Interstate Commerce Act, 49 U.S.C.:
National Transportation Policy, preceding Section 1 ..... 3, 11, 30-33
Section 3(4) 3, 11, 12, 30-35
Section 5 ..... 4, 13
Section 5(2) 2, 7, 12-15, 17, 18
Section 5(9) 10, 13, 14
Section 5(11) 3, 12, 31

Judicial Code, 28 U.S.C.:
Section 1253 2
Section 1336 2
Section 2101(b) 2
Section 2284 2
Sections 2312-25 2

Pacific Railroad Acts, 12 Stat. 489 (1862), 13 Stat. 356 (1864) ..... Passim

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JURISDICTIONAL STATEMENT

Appellants Southern Pacific Company ("SP") and Union Pacific Railroad Company ("UP") appeal from a judgment of the United States District Court for the District of Nebraska, dismissing appellants' complaint which sought to set aside a supplemental order of the Interstate Commerce Commission. Appellants submit this statement to show that the Supreme Court has jurisdiction and that substantial questions are presented.

Opinion Below

The opinion of the court below is not yet officially reported. The opinion and the dissenting opinion of Chief Judge Robinson are submitted herewith as Appendix A.

Jurisdiction

This suit was brought under 28 U.S.C. §§1336. 2284 and 2321-25 to set aside the supplemental order of the Commission dated January 6, 1966. The judgment sought to be reviewed was dated December 5, 1967, and was entered December 6, 1967. The notice of appeal was filed in the court below on December 27, 1967. The jurisdiction of the Supreme Court is conferred by 28 U.S.C. §§1253 and 2101(b) and is sustained by *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962).

Questions Presented

1. Did the court below err in finding that the Commission had reserved the power to modify conditions (a)-(e) in *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508 (1923)? (Pages 12 through 17 hereof.)

2. Did the court below err in sustaining the Commission's 1966 determination that condition (e) of its 1923 order (requiring SP, as successor to Central Pacific Railway Company ("CP"), to solicit traffic preferentially for UP) was contrary to the public interest and not just and reasonable as required by Section 5(2) of the Interstate Commerce Act, despite the Commission's determination, in 1962, on an identical record, that condition (e) continued to meet these criteria? (Pages 17 through 24 hereof.)

3. Did the court below err (i) in not construing the Pacific Railroad Acts (which provided for the construction of the first transcontinental railroad) as obligating CP and UP to prefer each other's line in the solicitation and routing of traffic, (ii) in not finding that the Commission in 1923 imposed the requirement in condition (e) that SP, as successor to CP, solicit preferentially for UP, for the

express purpose of carrying out the policy of the Pacific Railroad Acts and (iii) in finding that such reciprocal preferential solicitation and routing were in direct contravention of the Pacific Railroad Acts? (Pages 24 through 30 hereof.)

4. Did the court below err (i) finding that, if condition (e) were modified to eliminate SP preferential solicitation of UP, then the reciprocal preferential solicitation, provided for in the agreement of May 5, 1924 between SP and UP, was without legal legal authority, (ii) in sustaining the Commission's conclusion that the solicitation and routing provisions of said agreement should be set aside as violative of the National Transportation Policy, and (iii) in finding that such solicitation and routing provisions violated Section 3(4) of the Interstate Commerce Act? (Pages 30 through 35 hereof.)

5. Did the court below err in holding that since UP was not an applicant in the 1923 I.C.C. proceeding, the immunity afforded by Section 5(11) of the Interstate Commerce Act was not applicable to the preferential solicitation by UP of the CP line contemplated by condition (e)? (Footnote page 31 hereof.)

Statement

This case had its genesis in *United States* v. *Southern Pacific Co.*, 259 U.S. 214 (1922) which held that control of CP by a predecessor of SP violated the antitrust laws.

The line of CP extends from San Francisco to Ogden where it connects with UP which extends eastward to Omaha and Kansas City. The lines of CP and UP were constructed pursuant to the Pacific Railroad Acts (12 Stat. 489 (1862), 13 Stat. 356 (1864), as supplemented and

amended by various enactments). The line of CP also connects at Ogden with appellee Denver and Rio Grande Western Railroad Company ("DRG") which extends eastward to Denver and Pueblo.* The line of SP is a southern transcontinental route via El Paso which is competitive with the transcontinental routes of which CP is a part. The Supreme Court's determination that control of CP by SP violated the antitrust laws was premised on this competitive relationship.

During the pendency of the antitrust action, the Transportation Act of 1920 was enacted. (41 Stat. 472) This amended Section 5 of the Interstate Commerce Act ("Act") to authorize the Commission to approve the control of one railroad by another and, in connection therewith, to grant immunity from the antitrust laws. Before a decree had been entered in the antitrust action, SP applied to the Commission for approval of its control of CP. Both UP and DRG intervened in opposition. The Commission's report and order appear in *Control of Central Pacific by Southern Pacific,* 76 I.C.C. 508 (1923) (*"Control* case").

In the *Control* case the Commission approved SP's control of CP. It found that "both financially and from the standpoint of service" it was desirable for SP to continue in control of CP. (76 I.C.C. at 520) As to the objections of various intervenors in opposition the Commission stated that it was necessary to consider the following:

> "[W]hether it is possible to authorize the proposed acquisition of control subject to conditions which will remove the opportunity otherwise existing in the Southern Pacific to restrict competition or fetter the

* The line of appellee Western Pacific Railroad Company ("WP") extends from San Francisco to Salt Lake City where it connects with UP and DRG. The lines of WP and CP are competitive.

free and normal flow of interstate traffic by reason of its control of two competing transcontinental routes, and will adequately protect the rights of the Union Pacific and all interests of the public under the Pacific Railroad acts." (*Id.*)

Before setting the proceeding for oral argument the Commission submitted to the intervenors five conditions which had been suggested to the Commission by UP and SP and which the Commission indicated it might attach to any order approving SP control of CP.

The fifth of these conditions ultimately became condition (e) of the Commission's order in the *Control* case. This condition—which is the crux of the present case—deals with preferential solicitation. Condition (e) requires that, in respect of freight traffic between specified territories, SP shall request shippers to specify CP-UP as the route over which their traffic will travel.*

The other four conditions ultimately became conditions (a) through (d) of the Commission's order in the *Control*

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* Condition (e) reads as follows:

"(e) That the Southern Pacific Company shall cooperate with the Union Pacific Railroad Company to secure by active solicitation the routing of the maximum of freight traffic *via* the lines of the Union Pacific Railroad Company and the Central Pacific Railway Company through the Missouri River and Ogden, Utah, as parts of one connected continuous line, between all points in California and Oregon north of and including Caliente and Santa Margarita, Calif., and south of and including the Klamath Falls branch and Kirk, Oreg., on the one hand, and points north and west of a line along the northern boundaries of Oklahoma and Arkansas, to the Mississippi River, thence along the Mississippi and Ohio Rivers (but not including intermediate cities on the Ohio River) to Wheeling, W. Va., and thence on a line drawn just east of Pittsburgh, Pa., and Buffalo, N.Y., to Niagara Falls, N.Y." (76 I.C.C. at 530.)

case. These four conditions generally require that SP shall join with UP in maintaining through service, schedules, and rates over the CP-UP route so as not to discriminate as to time, service, or cost in favor of any other route in which either of them participates.**

At the oral argument in the *Control* case, UP indicated that the five conditions would secure adequately its rights under the Pacific Railroad Acts. DRG also approved the five conditions and indicated that its rights would be safeguarded thereby. Accordingly, the Commission expressed the following conclusions:

> "We think that the rights of the Union Pacific and all interests of the public under the Pacific Railroad acts may be protected by imposing upon the acquisition and exercise of control by the Southern Pacific Company of the Central Pacific the five conditions set out above. We think also that these conditions will so correct and remove any suppression of the normal flow of traffic over the Ogden route that the public interest generally will adequately be protected; and that they will bring

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** The Commission's order in the *Control* case, in addition to the five conditions referred to above, also contained four other conditions, (f) through (i). The Commission (in its 1962 supplemental report, hereinafter discussed) paraphrased these additional conditions:

> "Conditions (f) and (g) concerned the effect of adoption of a complete plan of consolidation of railroads, with the preparation of which the Commission was then charged. These two conditions are no longer applicable. The next condition, condition (h), prohibited the Southern Pacific from disposing of the Central Pacific's securities without prior approval." (317 I.C.C. at 472 n 2.)

Condition (i) provided that the proceeding might be reopened "for the purpose of making such orders as the commission may deem necessary or appropriate supplementary to the present order." (76 I.C.C. at 531.)

about, in connection with transcontinental traffic, a situation as favorable to the public from a traffic and service standpoint as though the Central Pacific were to remain free from Southern Pacific control." (76 I.C.C. at 524)

Following the Commission's decision in the *Control* case SP filed a petition in the antitrust action to give effect to the Commission's order which was, accordingly, made part of the final decree in *United States* v. *Southern Pacific Co.*, 290 Fed. 443 (D. Utah 1923).

In 1957—thirty-four years after the *Control* case—DRG petitioned the Commission to modify condition (e). The modification requested would relieve SP of its obligation to solicit for the UP route east of Ogden but would continue SP's obligation to solicit for the CP route west of Ogden.

Under Section 5(2) of the Act the Commission, to approve a transaction, must find it "consistent with the public interest"; and the terms and conditions attached by the Commission must be "just and reasonable". DRG's petition alleged, among other things, that condition (e) would no longer meet these criteria unless modified as requested.

DRG's petition also asked the Commission to declare unlawful an agreement of May 5, 1924, between SP and UP ("1924 agreement") and certain practices (or activities) of SP and UP. The 1924 agreement contains a number of provisions. Among them is a preferential solicitation undertaking of UP comparable to the preferential solicitation requirement imposed on SP by condition (e). The 1924 agrement also contains a preferential routing agreement in which SP and UP undertake that, in respect of the territories to which condition (e) is applicable, any

traffic not specifically routed by the shipper will be routed via the CP-UP route.*

After a hearing the Commission in 1962 issued a supplemental report and order (the "1962 report" and "1962 order", respectively). *Control of Central Pacific by Southern Pacific*, 317 I.C.C. 469 (1962). Five members of the Commission dissented. The majority rejected DRG's request for modification of condition (e) but did not pass on the 1924 agreement or the practices (or activities) complained of.

DRG then instituted an action in the United States District Court for Colorado to set aside the 1962 order. In 1964 that court determined that the Commission should have passed on the 1924 agreement and the practices (or activities) complained of. The court did not disapprove the Commission's action in the 1962 report in finding that condition (e) continued to be in the public interest and just and reasonable. A remand was ordered "for further proceedings consistent with this opinion". *Denver & R.G. W.R.R.* v. *ICC*, 229 F. Supp. 249, 254 (D. Col. 1964).

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*DRG thus sought to obtain Commission action in three areas:

1. *Solicitation.* This is the activity by which a railroad seeks to have a shipper designate the railroads over which his traffic is to travel. A shipper is free to designate such railroads as he wishes and railroads are obligated, under the Act, to respect the shipper's instructions.

2. *Routing.* This is the activity by which there is designated the railroads over which the shipper's traffic is to travel. This is done by the originating railroad when the shipper has not made such designation.

3. *Practices (or Activities).* These terms have been often used interchangeably in this case and neither term has been used with precision. The court below appears to have confined the terms to practices (or activities) provided for by the 1924 agreement. The terms, however, appeared to have been used by the Commission to embrace matters that do not purport to be within the scope of con-

The Commission accordingly reopened the proceeding** Briefs were submitted and the Commission heard oral argument but no further hearing was held.

On January 6, 1966, the Commission handed down the report and order (the "1966 report" and "1966 order", respectively) which is here in issue. *Control of Central Pacific by Southern Pacific,* 328 I.C.C. 345 (1966). The Commission unanimously concluded—contrary to its conclusion of four years earlier on an identical record—that condition (e) was no longer in the public interest or just and reasonable and should be modified as requested by DRG.*** The Commission also concluded that the preferential solicitation and routing provisions of the 1924 agreement were unlawful.

By order, dated July 1, 1966, the Commission denied appellants' petition for reconsideration, and the present action was then instituted to set aside the 1966 order.

Statement of Reasons Why the Questions Presented Are Substantial

The issues in this case have brought forth such a diversity of viewpoints that there can be no doubt of their sub-

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dition (e) or the 1924 agreement. Although the Commission's 1966 supplemental report and order which is here in issue speaks critically of practices (or activities) in the introductory portion of the report, the report does not pass on the practices (or activities) and no reference thereto is contained in the order.

** During the pendency of the proceeding CP was merged into SP pursuant to approval of the Commission. *Southern Pac. Co. Merger,* 307 I.C.C. 806 (1959) (text not published). It was provided, however, that nothing contained in the authorization should be construed as affecting in any way the interests of any of the participants in the instant proceeding.

*** The 1966 order would modify condition (e) to read as follows:

"(e) That the Southern Pacific Company shall continue to secure by active solicitation the routing of the maximum of freight traffic through the Missouri River and Ogden, Utah, between all points in California and Oregon, north of and including Caliente and Santa Margarita, Calif., and south of

stantiality. The decision of the court below was rendered by two of the three judges. The third judge, Chief Judge Robinson, dissented. The majority of the court affirmed the 1966 report and order of the Commission. This report and order reversed the 1962 report and order which, on an identical record, had reached a contrary result. Five of the eleven members of the Commission had dissented from the 1962 report and order.

The substantiality of the issues is also apparent from their magnitude and complexity:

(1) The 1962 and the 1966 reports resulted from a reopening of the 1923 *Control* case. There is a substantial issue whether the *Control* case order reserved jurisdiction to modify conditions (a)-(e), and whether Section 5(9) of the Act confers such jurisdiction. This is an issue of general importance because of the large number of current railroad merger proceedings in most of which the Commission appears to contemplate possible reopening.

(2) Since the Commission's 1966 report reached a result contrary to the 1962 report, there is a substantial issue whether the Commission, as required by the Administrative Procedure Act, 49 U.S.C. §557(c), gave the reasons or basis for its action. The substantiality of this issue is underscored by the fact that in 1962 the Commission gave, as the basis for its decision, four grounds which are largely ignored in the 1966 report.

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and including the Klamath Falls branch and Kirk, Oreg., on the one hand, and points north and west of a line along the northern boundaries of Oklahoma and Arkansas, to the Mississippi River, thence along the Mississippi and Ohio Rivers (but not including intermediate cities on the Ohio River) to Wheeling, W. Va., and thence on a line drawn just east of Pittsburgh, Pa., and Buffalo, N. Y., to Niagara Falls, N. Y." 328 I.C.C. at 358

(3) There are substantial issues as to the meaning of the Pacific Railroad Acts. These issues relate to reciprocal preferential solicitation and routing by the CP and UP routes. The diversity of views which these issues have evoked attest to their substantiality. Appellants contend that the Acts require such solicitation and routing. A majority of the court below, however, decided that the Acts prohibit such solicitation and routing. Chief Judge Robinson, in his dissenting opinion, took a third view that the Acts permit but do not require such solicitation and routing. The views of the Commission have fluctuated: in 1923 and 1962 the Commission felt that the Acts require such solicitation, but in 1966 the Commission was of a contrary view.

(4) There are substantial and novel issues as to the power of the Commission to enjoin voluntary preferential solicitation and routing under the National Transportation Policy and Section 3(4) of the Act. Here, too, the diversity of views underscores the substantiality of the issues. Appellants contend that nothing in the Act prohibits preferential solicitation and that preferential routing is prohibited only if there is affected an appreciable percentage of the traffic involved. The Commission held that all preferential routing is prohibited by the National Transportation Policy and Section 3(4), but that preferential solicitation is prohibited only by the National Transportation Policy. The court below was of the opinion that an appreciable percentage of the traffic involved must be affected before Section 3(4) is violated. The court held, however, that solicitation as well as routing was included in Section 3(4) and that the statute had thus been violated. The substantiality of these issues is emphasized by the fact that, as the court below recog-

nized, preferential solicitation is a common industry practice. The novelty of these issues is apparent from the fact that never before has the Commission or any court sought to condemn voluntary preferential solicitation despite the fact that Section 3(4) has been law for 48 years. The court also went on to hold that preferential solicitation by UP, even though contemplated by the Commission as a result of the imposition of condition (e), did not receive immunity under Section 5(11) of the Act and hence was unlawful. The court reached the unprecedented conclusion that in Section 5(2) proceedings only the carriers participating as applicants in the transaction can benefit from paragraph (11). The increasing tendency of the Commission to attach terms and conditions to its merger authorizations points up the substantiality of this issue.

Finally, the substantiality of the issues is apparent from the importance of the subject matter. This case involves the basic traffic practices of at least three transcontinental railroads, and the volume of traffic affected is enormous. As an example, the eastbound traffic interchanged by the SP to the UP was "6,210,332 tons in 1958." (317 I.C.C. at 475)

1. The Commission Did Not Retain Jurisdiction To Modify Conditions (a)-(e).

Appellants contend that the Commission was without jurisdiction to modify conditions (a)-(e) because its 1923 order imposing these conditions did not retain the power to do so. Appellants do not contend, as the court below seemed to feel (p. 5a), that the Commission could not have modified condition (e) had it reserved such power.

The Commission and the court below appear to have recognized that if the Commission is to modify condition (e), it is necessary for the Commission to have reserved the power of modification. Accordingly, the issue is whether the Commission in fact has reserved such power. The Commission and the court below concluded that condition (i) of the *Control* case constituted such a reservation. Condition (i) provides that the proceeding may be reopened for the purpose of making "supplementary" orders.*

Appellants contend, however, that a supplementary order is one which merely assists in carrying out the purpose of the original order. An example would be an order which supplies a deficiency in the original order. On the other hand, the relief granted DRG by the Commission (and sustained by the court below) would alter or modify rather than supplement the Commission's original order.

The correctness of appellants' position was indicated by the Supreme Court in *Baltimore & O. R. R.* v. *United States*, 386 U.S. 372 (1967):

> "Once a valid order is entered by the Commission, it, of course, has the power *to retain jurisdiction* for the

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* Condition (i) follows almost verbatim paragraph (9) of Section 5 of the Act which empowers the Commission to issue "supplemental" orders in Section 5 proceedings. Condition (i) provides:

> "That this proceeding may be reopened at any time by order of the commission either upon the initiative of the commission or, in the discretion of the commission, upon the motion of any person claiming an interest in the matter, for the purpose of making such orders as the commission may deem necessary or appropriate supplementary to the present order." 76 I.C.C. at 531.

The Court below suggests, but does not develop, the additional thought that, even without a reservation of the power of modification, the Commission could modify condition (e) pursuant to Section 5(9). (p. 6a) In the 1966 report, the Commission suggests a like interpretation of Section 5(9). (328 I.C.C. at 357) As discussed in the text, however, Appellants contend that the power to supplement is not broad enough to confer the power of modification.

> purpose of making *modifications* that it finds necessary in the light of subsequent circumstances or to assist compliance with prior conditions previously required or, of course, to correct any errors. The Commission also has power *under* §5(9) *of the Act* to make certain *supplemental* orders and under §17(3) may correct clerical errors in certificates." *Id.* at 387 (emphasis added).

The above quotation is illuminating in two respects. It is a recognition of the difference between "modify" and "supplement".* Also it confirms that if the Commission, in a Section 5(2) proceeding, wishes to have the power to make "subsequent modifications" it must "retain jurisdiction" to do so. It is apparent therefore that reference by the Commission to its power to make supplementary orders does not constitute such a retention of modification jurisdiction.

The court below (p. 6a) referred to *Baltimore & Ohio R.R.*, but, inexplicably, quoted only the first part of the initial sentence of the passage set out above.** Had it quoted both sentences the antithesis between modify and supplement would have been obvious and the court would have been aware of the incorrectness of its position.

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* This distinction is, in fact, apparent from the contrasting language of paragraphs (2) and (9) of Section 5. Paragraph (2) authorizes the Commission to approve a proposal with such "modifications" as the Commission finds to be just and reasonable. Subsequent to such approval, paragraph (9) authorizes the Commission to supplement. Had it been intended that the Commission would subsequently have the power to modify (without reserving such power), paragraph (9) would have used the language of paragraph (2) and spoken of modifying rather than supplementing.

** The court below simply stated:

> "The Commission 'has the power to retain jurisdiction for the purpose of making modifications that it finds necessary in the light of subsequent circumstances. . . .' *Baltimore & O.R.R.* v. *United States*, 386 U.S. 372, 387 (1967)." (p. 6a)

The omission in 1923 from the *Control* case order of a reservation of jurisdiction to modify conditions (a)-(e) was not inadvertent. Condition (i) was a conscious departure from the pattern followed by the Commission in other Section 5(2) proceedings—both before and after the *Control* case. Thus in the *Chicago Junction Case*, 71 I.C.C. 631 (1922) (decided less than a year before the *Control* case) the Commission's order contained the following terminal paragraph:

> "17. Any party or any person having an interest in the subject matter may at any future time make application for such *modification of the above conditions*, or any of them, as may be required in the public interest, and jurisdiction is retained to reopen the proceeding on our own motion for the same purpose." *Id.* at 641 (emphasis added).

Subsequent Commission Section 5(2) decisions have used almost identical language. See, *e.g., Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 492 (1950), sustained *sub nom. New York, & C. & St. L. R. R.* v. *United States*, 95 F. Supp. 811 (N.D. Ohio 1951); *Norfolk & W. Ry. Co. Merger*, 307 I.C.C. 401, 447 (1959). The failure of the Commission to use such language in the *Control* case is decisive that it did not intend to retain the power of modification. Neither the Commission nor the court below, however, recognized that the *Control* case was a complete departure from normal Commission practice.*

The foregoing indicates the incorrectness of the determination of the court below that conditions (a)-(e) were sub-

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* In recent merger proceedings the Commission has continued its practice of a specific reservation of jurisdiction when it wishes to have the power of modification. As the Supreme Court pointed out in *Penn-Central & N.&W. Inclusion Cases*, 36 U.S.L.W. 4093 (U.S. Jan. 16, 1968), the Commission "specifically reserved jurisdiction to reopen proceedings and *modify* the protective *conditions* 'in the light of experience'." (*Id.* at 4100) (emphasis added).

ject to modification. In support of its determination the court observed that a contrary result "could illogically bind our national transportation system to archaic philosophies beneficial only for conditions of the past, but detrimental to the public welfare today". (p. 6a) Such an observation, however, obscures appellants' basic contention that their rights were conferred by the Pacific Railroad Acts. When conditions (a)-(e) were imposed the Commission and the parties to the *Control* case believed, as hereinafter discussed, that conditions (a)-(e) were no more than a statement of the rights of UP under those Acts. Since the Pacific Railroad Acts could not be modified (other than by Congress) there was no reason to contemplate a modification of conditions (a)-(e) by the Commission. For this reason the Commission reserved no power of modification. It is immaterial whether the Pacific Railroad Acts reflect "archaic philosophies" and whether the conditions embodying those Acts appear now to be beneficial "only for conditions of the past". If the Pacific Railroad Acts are "detrimental to the public welfare today" this is the concern not of the courts but of Congress. As Chief Judge Robinson pointed out in his dissenting opinion below: "The rights which are reflected in "condition e" were granted by the Congress; they cannot be deleted by the Commission." (p. 40a)

The parties to the *Control* case acquiesced in the Commission's original order with the knowledge that the power of modification was not reserved. Therefore, even if the Commission now feels (and as the court below believes) that its original construction of the Pacific Railroad Acts was incorrect, this confers no jurisdiction to modify conditions (a)-(e).

Furthermore, even if it be assumed that the Commission has power to modify conditions (a)-(e), the Commission in exercising that power must give weight to the fact that conditions (a)-(e) constituted an agreement between UP and SP. Neither the court below nor the Commission, however, showed any awareness that an agreement was being modified and thereby a fundamental diminution made in the consideration which UP received for the withdrawal of its opposition to SP's application in 1923. Finally, (although SP does not subscribe to this view) UP contends that if it is to be deprived of the consideration for which it bargained, there should be a restoration of the *status quo* before the Commission's decision in the *Control* case. This would leave UP free to renew its opposition before the Commission and the courts to SP's control of the CP route.

2. The Commission Did Not Give Adequate Reasons or Basis For Reversing Its Determination Of Four Years Earlier, On An Identical Record, That Condition (e) Continued To Be In The Public Interest And Just And Reasonable.

The Administrative Procedure Act embodies the common law requirement that an administrative agency must give the "reasons or basis" for its decision. 5 U.S.C. §557(c). The Commission in the 1966 report ignored this requirement in concluding that condition (e) was contrary to the public interest and not just and reasonable, as required by Section 5(2) of the Act. The 1966 report gave no explanation as to why, on an identical record, the Commission reached a conclusion the exact opposite of its conclusion of four years earlier that condition (e) met these criteria.

In its 1966 report the Commission intimated that it departed from its 1962 report because of the expansion of

the scope of the proceeding pursuant to the remand of the Colorado District Court in 1964.* This explanation, however, makes no sense. The remand required the Commission to expand the proceeding to include the preferential routing requirement of the 1924 agreement (and any other practices or activities complained of) as well as preferential solicitation. The direction of the Colorado District Court, however, related simply to administrative convenience. It required the Commission to pass on all of the issues raised by DRG rather than simply the issue of whether condition (e) should be modified.

The inclusion of additional issues, however, could in no way have affected the Commission's earlier substantive determination in respect of the issue of preferential solicitation. The validity of preferential solicitation and preferential routing are determinable by different criteria. To take but one example, condition (e) must be reviewed from the standpoint of Section 5(2) of the Act, but this section is not involved in the review of the 1924 agreement. This is apparent from the analysis of the issues by the Commission in the 1966 report. No additional evidence relating to condition (e) was considered by the Commission as a result of the remand. Thus, the introduction of the issue of routing in the proceeding could not, logically, have affected the

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* This explanation is advanced fleetingly in one sentence:

> *"After consideration of the full record, without the procedural limitations before imposed,* we now find that the present effect of the discriminatory practices against the Rio Grande in the preferential solicitation and routing of traffic results in a stifling of competition between the Union Pacific and the Rio Grande on Transcontinental traffic." (328 I.C.C. at 356.) (Emphasis added.)

Commission's prior determination in respect of the preferential solicitation requirement of condition (e).*

Actually, the court below recognized that the explanation given by the Commission for not following its 1962 report makes no sense. Nonetheless the court failed to remand the proceeding, as it was required to do, in order to give the Commission an opportunity to develop a rational basis for the 1966 report. Instead, the court undertook to supply what it conceived to be the basis for the Commission's action. The court speculated that the different result arrived at in the 1962 report had come about because of "an erroneous interpretation of the Pacific Railroad Acts".**

Ironically, the court below, in another context, recognized the impropriety of judicial affirmance of "agency action other than on the grounds invoked by the agency.

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* The court below appears to have recognized that the purpose of the remand was to require the Commission to consider other issues in addition to condition (e). (p. 19a) Yet the court below erroneously states that the remand was to require the Commission to consider "additional evidence" (pp. 1a, 3a). There is no indication in the opinion of the Colorado District Court that, so far as condition (e) was concerned, there was any evidence which the Commission had not considered.

** "However, it is apparent to us, at least, that in 1962 the Commission was guided more by an erroneous interpretation of the Pacific Railroad Acts than it was by considerations 'of public interest'." (p. 19a)

The court nonetheless recognized the anomaly of an agency reaching two completely different results on an identical record:

"Although the 1962 and the 1966 Commission orders lend appearance, as Mr. Justice Douglas says in *Baltimore & O.R.R.* v. *United States*, supra, 386 U.S. at 449 (dissenting in part), of having been 'decided by different regulatory bodies rather than the same commission,' nevertheless we feel there exist sufficient findings to support modification of condition (e) as being no longer 'just and reasonable' nor in accord with the 'public interest'." (p. 22a)

Burlington Truck Lines v. *United States*, 371 U.S. 156, 169 (1962)." (p. 30a) An earlier case to the same effect is *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

Even had it been proper, however, for the court below to supply a basis for the 1966 report, the basis suggested would not explain the Commission's departure from its 1962 report. The interpretation of the Pacific Railroad Acts was only one of four grounds relied on in 1962. The other three grounds were ignored by the Commission in the 1966 report and by the court below. And the fourth basis —the Pacific Railroad Acts—was treated in the 1966 report in so irrational a fashion that no illumination is given as to why those Acts were interpreted differently by the Commission four years earlier.

The three additional bases of the 1962 report will now be reviewed. (The Commission's conflicting interpretations of the Pacific Railroad Acts will be treated at pages 24 through 30 hereof.) The court below erred in not requiring the Commission to explain why each of such bases did not continue to require retention of condition (e) in its original form.

(A) In 1962 the Commission stated that in view of the "long-continued reliance" on conditions (a)-(e) by appellants in promoting the movement of traffic via the CP-UP route and developing facilities for its efficient handling, the modification of condition (e) requested by DRG should not be made "in the absence of a compelling showing that, because of changed conditions, the public interest so requires." (317 I.C.C. at 483) The 1962 report found that DRG had not established that the public interest supported modification of condition (e). Specifically, DRG failed to establish that appellants' service was deficient or that DRG could perform a superior service. The Commission ex-

plained in 1962 that, although DRG would benefit from the requested modification, the impact thereof on UP must also be considered. DRG had presented no evidence from which to estimate the adverse consequences on UP although the record indicated that DRG had prospered and its service improved despite the existence of condition (e). (317 I.C.C. at 483) This analysis was ignored by the Commission in its 1966 report; and the court below made no comment on the Commission's failure even to discuss these public interest considerations which, four years earlier on an identical record, the Commission had found decisive. This is bewildering since the court below emphasized in other contexts the significance of the public interest in the Commission's determination. (See, *e.g.*, p. 19a)

(B) Another reason given in the 1962 report for retention of condition (e) in its original form was that condition (e) was one of five conditions imposed as "a single package". The Commission said that it could not modify one condition without concurrent consideration of the other four, and DRG had offered no proof concerning conditions (a)-(d). (317 I.C.C. at 484) The interrelationship of the five conditions, however, is ignored in the 1966 report, and the court below made no comment thereon.

(C) A third inconsistency between the 1962 and 1966 reports relates to the effect which modification of condition (e) would have on the CP route. In 1962 the Commission pointed out that the requested modification would relieve UP from any obligation to solicit the CP route.* Since this would free UP to solicit, for example. the competitive

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* This is because modification would constitute a determination that the Pacific Railroad Acts do not impose a reciprocal obligation on CP and UP to solicit each other's route. This was recognized in the dissenting opinion of Chief Judge Robinson in the court below. (p. 38a)

WP route, it would tend to diminish the volume of traffic UP would interchange with CP. The 1962 report concluded therefore that the requested modification of condition (e) would adversely affect the CP route. (317 I.C.C. at 484) In 1966, however, the Commission reached the opposite conclusion and found that modification of condition (e) would "strengthen and preserve" the CP route. (328 I.C.C. at 354) The Commission did not explain or even mention its earlier, diametrically opposite conclusion. This aspect of the 1966 report was also ignored by the court below.

The explanation advanced by the Commission—the expanded scope of the proceeding—for the differences between the 1966 report and the 1962 report is unsatisfactory for still another reason. Although DRG consented to condition (e) in 1923, the Commission in 1966 concluded that since 1923 a change had occurred in DRG's competitive status which made the requested modification appropriate.* The expanded scope of the proceeding, however, in no way added to the Commission's awareness of any change in DRG's competitive situation. The evidence thereon not only was before the Commission in 1962 but it was considered even more fully then than in 1966. In both the 1962 and 1966 reports the Commission concluded—incorrectly in appellants' view—that DRG was not in 1923 a substantial competitor of UP. In 1962, however, the Commission did not permit this finding to affect its ultimate determination that condition (e) should be retained in its original form.

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* "Had the petitioner's competitive situation at Ogden been more than that of a minor connecting line in 1923, we have no doubt that the requirements of condition (e) would have been different from those actually imposed in the *Control* case." (328 I.C.C. at 356)

From the foregoing it is obvious that the Commission made a 180 degree turn in its thinking between 1962 and 1966. Appellants do not contend that the Commission lacks the power to reverse itself. Appellants do contend, however, that the Commission was required to give a rational explanation for doing so and that the court below erred in not requiring this.*

Furthermore, the Commission's entire approach, so far as DRG's competitive status is concerned, was without rational foundation and, for this reason as well, the court below erred in not remanding the proceeding. As previously mentioned, an essential part of the Commission's 1966 report is its finding that DRG in 1923 was a "minor connecting line" and that DRG has since that date become fully competitive with UP. By the term "minor connecting line" the Commission appears to have meant that DRG was not in 1923 a substantial competitor of UP. This finding, however, is backed by no evidence,** and the Commission's approach is, in any event, unsupportable for at least two reasons. In the first place, there is not a word in the *Control*

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* The applicable law is clear. See *e.g., Baltimore & O. R.R.* v. *United States,* 386 U.S. 372, 389 (1967); *Northeast Airlines, Inc.,* v. *CAB,* 331 F.2d 579 (1st Cir. 1964).

** The evidence to the contrary is overwhelming. For example, by at least 1911—12 years before the Commission's decision in the *Control* case—DRG had been recognized as a major rather than a minor connecting line:

> "The Denver & Rio Grande Company and its allied lines under one control had a through route extending from Ogden, through Denver, Kansas City, and St. Louis, to Chicago and other interior points, and thence by many available connections to New York and the seaboard. This was *obviously a most attractive and powerful rival of the Union Pacific Company, and a constant menace to its success." United States* v. *Union Pacific R.R.,* 188 Fed. 102, 112 (D. Utah 1911) (emphasis added).

Although the Supreme Court reversed the District Court's determination (226 U.S. 61 (1912)) it did not take issue with the District Court's characterization of DRG.

case to indicate that the Commission in 1923 regarded DRG as a minor connecting line or in any other way than as a substantial competitor of UP. Secondly, there is nothing in the *Control* case indicating that the Commission's failure to make DRG a beneficiary of condition (e) in any way related to DRG's competitive situation at that time.*

The *Control* case suggests that the Commission in 1923 regarded DRG as a substantial competitor of UP or at least was aware of the possibility that DRG might shortly become fully competitive. Otherwise there would have been no reason for the Commission in 1923 to seek Rio Grande's views with respect to the conditions to be imposed. Nor would there have been any reason for DRG to oppose SP's application to control CP unless DRG was either a substantial competitor of UP or anticipated becoming one. In other words, unless DRG expected to derive substantial traffic from CP, it would be immaterial whether SP controlled CP.

3. The Pacific Railroad Acts Require CP And UP To Solicit And Route Preferentially Each Other's Line.**

The opinion of the court below conveys the impression that the question of whether the Pacific Railroad Acts

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* The court below did not address itself to appellants' arguments. It simply stated:

> "The Commission considered evidence which clearly demonstrated the change since 1923 in the circumstances of Rio Grande as a competing line using the Ogden Gateway." (p. 17a)

Appellants do not dispute that DRG's circumstances have to some extent changed. This, however, does not address itself to appellants' point which is that there is no evidence supporting the Commission's theory of a transformation from a minor to a major connection.

** Appellants contend that the Acts require preferential routing as well as preferential solicitation. Since, however (as hereinafter discussed), the amount of unrouted traffic is minimal, the discussion herein of the Acts will be only in terms of preferential solicitation.

require CP and UP preferentially to solicit each other's line did not arise until the reopening of the *Control* case in 1957. The court began its discussion of the question by pointing out that the Commission's 1962 report supports appellants' interpretation of the Acts but that in 1966 the Commission reversed itself.* The court then concluded that, for the reasons hereinafter discussed, the 1966 report represents the correct construction.

The approach used by the court below ignored the fact that the issue involved had been passed on by the Supreme Court in 1912 and by the Commission in the *Control* case in 1923. In *United States* v. *Union Pacific R.R.*, 226 U.S. 61 (1912) it was indicated that the Pacific Railroad Acts require CP and UP to solicit preferentially each other's line. Although the opinion below quotes from the Supreme Court's decision, the court failed to understand its significance. The holding in that case was that UP control of SP violated the antitrust laws. UP had endeavored to justify such control on the ground that it was necessary to prevent SP (through its control of CP) from discriminating against the CP-UP route in favor of SP's southern route. UP had pointed out to the Supreme Court that traffic formerly received by DRG from CP at Ogden had practically disappeared due to the "favoring attitude of the Southern Pacific to the Union Pacific" (226 U.S. at 90). And, UP argued, if its control of SP were terminated, SP might divert traffic from UP in the same way in which SP had diverted traffic from DRG. The Supreme

* The court did not mention that the Commission reached its 1966 interpretation by ignoring the arguments which it relied on in 1962 to support a contrary interpretation. The Commission in 1962 documented its interpretation by quoting the first paragraph of page 524 of the *Control* case (quoted at pp. 6-7 herein) and by referring to the fact that the Pacific Railroad Acts authorized CP and UP "to form themselves into one consolidated company". (317 I.C.C. at 484)

Court rejected this argument. It said that the practices of SP in diverting traffic (although lawful if practiced against DRG) could not be carried on against UP without violation of the Pacific Railroad Acts. The Supreme Court did not specify what these practices were although it indicated that rate discrimination was not involved—"the former published rates are maintained." (226 U.S. at 90) It would seem, however, from the context of the opinion, that such practices must have consisted principally of preferential solicitation and routing. In other words, the Supreme Court interpreted the Pacific Railroad Acts as requiring CP to prefer, by solicitation and routing, the UP route.*

In 1923 the Commission's report in the *Control* case made it evident that condition (e) was imposed to satisfy the rights of UP under the Pacific Railroad Acts. This was also recognized in the Commission's 1962 report. Both the Commission in 1966 and the court below professed to find, however, that the primary if not sole reason for the imposition of condition (e) in 1923 was to prevent SP from diverting traffic from the CP route to SP's southern

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*The dissenting opinion of Chief Judge Robinson shows an appreciation of the significance of the Supreme Court's opinion:

> "I believe that the opinion clearly indicates that the Union Pacific and Central Pacific were to be given special treatment because of the Acts that created them. While the extent of their rights is not defined, their existence is nevertheless acknowledged." (p. 37a n 4)

Chief Judge Robinson also pointed out (p. 39a) that counsel for the government in *United States* v. *Southern Pacific Co.*, 259 U.S. 214 at 217 (1922), used a like analysis of the Pacific Railroad Acts.

> "'The Pacific Railroad laws imposed on the franchise of the Central Pacific Railroad and on the franchise of the Union Pacific Railroad the reciprocal duty of the one railroad not to discriminate against the other in favor of any other railroad, *but to exert together in normal voluntary cooperation all of the natural forces of a single railroad naturally competing with the parallel Southern Pacific Railroad. . . .*' (Emphasis supplied)"

route via El Paso. It is clear that the prevention of such diversion was one objective of condition (e). But it is equally clear that another objective of condition (e) was to insure that such traffic should move via UP. This is apparent from the two quotations from the *Control* case which are set forth herein at pp. 4-5 and 6-7. In both quotations it is stated that prevention of diversion via El Paso was one objective, but it is also stated that another objective was the protection of UP's rights under the Pacific Railroad Acts. (In fact, in the second quotation (pp. 6-7) the latter objective is mentioned first.) Had the sole objective of condition (e) been the prevention of diversion via El Paso, there would have been no need to mention UP or the Pacific Railroad Acts.

Further proof that the Commission in 1923 felt that preferential solicitation was required by the Pacific Railroad Acts is found in the Commission's use, verbatim, of the language of the Pacific Railroad Acts—"one connected, continuous line"—in three of the conditions: (a), (b) and (e). There would have been no purpose in using these precise words had the Commission not thought that in imposing conditions (a)-(e), it was insuring that CP (under SP control) would fulfill its preferential solicitation and other obligations to UP under the Pacific Railroad Acts.*

Quite apart from the language of the Acts, it is significant that Congress used two corporations rather than one in the construction of the first transcontinental railroad simply because that seemed the most expeditious way of getting the project completed. The general tenor of the

* The quoted language—"one connected, continuous line"— is, of course, only one of several portions of the Acts which, in appellants' view, supports the interpretation that preferential solicitation is required.

Pacific Railroad Acts indicates that the two corporations —CP and UP—after the completion of construction, shall as nearly as possible be operated as one railroad.

The Commission's recognition that conditions (a)-(e) were compelled by the Pacific Railroad Acts is not surprising in view of the oral argument in the *Control* case. Counsel for UP on at least two occasions pointed out that the conditions were no more than an embodiment of some of UP's rights under the Pacific Railroad Acts. Counsel specifically directed the Commission's attention to the fact that the intended effect of condition (e) was to require SP to prefer UP to the detriment of DRG (Tr. 3985-6, 3989).

Neither the 1966 report nor the opinion of the court below analyze the language of the *Control* case or mention the 1923 oral argument.* Nor is there recognition that certain of the language of condition (e) is taken verbatim from the Pacific Railroad Acts.

The court below not only rejected appellants' contention that the Pacific Railroad Acts require preferential solicitation but concluded that the Acts prohibited such solicitation and any other preferential treatment of CP or UP by either of them or any discrimination by either of them against any other railroad. It reached this conclu-

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* The court below in a footnote refers to appellants' argument that it was the understanding of the parties to the *Control* case that condition (e) was in furtherance of the Pacific Railroad Acts. This argument was brushed aside by the court with a quotation of Mr. Justice Brennan that "the ICC is not [the] prisoner of the parties' submissions". (p. 10a n 9) This is, of course, true but it does not deal with appellants' point. Appellants' position here is that, in the *Control* case, conditions (a)-(e) were suggested to the Commission by SP and UP as a way of, among other things, protecting UP's rights under the Pacific Railroad Acts and were imposed by the Commission with this express objective. The 1966 report fails to recognize this.

sion by using two arguments which have never been advanced by any party or have ever been relied on by the Commission or any court.

First, the court below observed that the Pacific Railroad Acts provided not only for the construction of CP and UP but for the construction of three branch lines as well. At least one of these branch lines was to be constructed upon "the same terms and conditions in all respects" as CP and UP. (p. 16a) Therefore, argued the court, how can CP and UP preferentially solicit each other's line since this might discriminate against one of the branch lines. This is not realistic. As Chief Judge Robinson pointed out in dissent, the branch lines were intended as feeder lines for the main line. (p. 35a) The branches were thus not competitive with CP and UP, and preferential solicitation by CP and UP of each other's line could not discriminate against them.*

Second, the court below, in finding that the Pacific Railroad Acts prohibit preferential solicitation, relied on the provision of the Pacific Railroad Acts which authorized other railroads "to connect their road with the road and branches" of CP and UP. (p. 14a) The court also relied on an Act of 1866 which authorized every railroad in the United States to connect with other railroads "so as to form continuous lines . . ." (pp. 14a-15a.) It is difficult to see why the court below attached significance to these provisions. Any obligation of CP and UP to connect with other railroads is in no way inconsistent with the obligation of CP and UP preferentially to solicit each other's lines.

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* Any issue involving the branch lines is, of course, academic since almost from the outset the branch lines became part of UP.

The court below cites and discusses several cases but their relevance is obscure. As previously mentioned, the court quotes (pp. 11a-13a) from the Supreme Court's 1912 decision in *United States* v. *Union Pacific R.R.*, 226 U.S. 61 (1912), but fails to appreciate that it supports appellants' position. The court below also quotes (pp. 13a-14a) from *Union Pacific Ry.* v. *Chicago, R. I. & P. Ry.*, 163 U.S. 564 (1896). But as Chief Judge Robinson observed in his dissenting opinion "neither the questions involved nor the answers given shed light here." (p. 37a) And as to the other cases relied on by the court below, Chief Judge Robinson observed that they "might well be cited in favor of the position taken by the Union Pacific as well as those conclusions for which they were cited." (p. 37a)

4. The Preferential Solicitation And Preferential Routing Provisions Of The 1924 Agreement Are Not Violative Of The National Transportation Policy Or Section 3(4) Of The Act.

Two provisions of the 1924 agreement are in issue: (A) the undertaking by UP and SP for the preferential routing of unrouted traffic over each other's line; and (B) the undertaking by UP to preferentially solicit the CP line.

Appellants contend, as previously mentioned, that the Pacific Railroad Acts require UP and CP to preferentially route as well as preferentially solicit each other's line. This contention was rejected by the Commission in 1966 and by the court below. It was held that the preferential routing provision was unlawful because it was contrary to the National Transportation Policy and Section 3(4) of the Act.

As to the preferential solicitation provision of the 1924 agreement the Commission held that it was unlawful because

it was contrary to the National Transportation Policy. This conclusion also was affirmed by the court below which held, additionally, that the preferential solicitation provision of the 1924 agreement was violative of Section 3(4) of the Act.*

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* Furthermore, the court, for no apparent reason, went on to hold that even though the Commission had contemplated, in condition (e), that UP would preferentially solicit the CP route, such solicitation was unlawful. This is an astonishing result since, as the court recognized, such solicitation by UP is the complement of the solicitation (by SP of UP) required by condition (e). (The inclusion of preferential solicitation in the 1924 agreement did no more than create a direct obligation of UP to SP in respect of the solicitation required by the Pacific Railroad Acts. In the absence of such an agreement, SP's right against UP had to be derived through CP.)

Section 5(11) grants immunity, in connection with transactions under Section 5(2), from "prohibitions of law". Yet the court below held that UP could not invoke this provision (in defense of the solicitation by UP contemplated by condition (e)) since immunity was conferred only on the "carrier . . . participating" in the transaction. (p. 24a) Since UP was not an applicant in the *Control* case, the court considered it not a participant in the transaction. This, however, is an utterly technical approach which gives paragraph (11) a construction which has never been used by the Commission or any court. Section 5(11) should be construed as broadly as is necessary in order to insure that the transaction approved by the Commission may be lawfully effectuated. The legislative history of Section 5(11) shows a progressive broadening of the paragraph. In its present form the paragraph obviously seeks to confer maximum immunity. It relieves "any carriers or other corporations, and their officers and employees and any other persons . . ." Even in the form in which it was first enacted in 1920, (41 Stat. 482), the paragraph afforded relief to the "carriers affected", which would have included UP as well as SP. The subsequent amendments obviously were not intended to narrow the scope of paragraph (11). In any event, Section 204 of the Emergency Railroad Transportation Act of 1933 (codified in 49 U.S.C. § 5a) contains a saving clause which causes paragraph (11) in its original form to be applicable in the instant situation.

The construction of paragraph (11) proposed by the court below would seriously impair its utility in carrier unifications. The purpose of paragraph (11) is to make it possible for a transaction to be carried into effect "with the terms and conditions, if any, imposed by the Commission". It must, therefore, have been intended that immunity would be given to any person—whether or not an applicant —whose cooperation would be required to carry out the "terms and conditions."

The Commission held that both the routing and solicitation features of the 1924 agreement were violative of the National Transportation Policy because of their anti-competitive effect. The court below upheld this conclusion on the ground that the Commission's "appraisal of the facts with regard to the National Transportation Policy must stand if there is evidence to warrant the decision" (p. 25a). The court ignored appellants' argument that there is nothing in the National Transportation Policy which is applicable to preferential solicitation or routing. While it is true that the Policy condemns "unjust discrimination, undue preferences or advantages or unfair or destructive competitive practices", this language relates only to "charges for transportation service" and has no conceivable application to solicitation or routing.*

Even if the language of the Policy did relate to preferential solicitation, this would still not confer jurisdiction on the Commission to declare a preferential solicitation agreement unlawful. For such jurisdiction to exist, there must be a section of the Act empowering the Commission to invalidate such an agreement. The National Transportation Policy is simply a general expression of Congressional policy. It may be invoked by the Commission only in connection with the exercise of jurisdiction conferred by some other provision of the Act.

As to preferential routing, it is not disputed that the Commission has jurisdiction to pass on the legality thereof. Section 3(4) of the Act prohibits such routing if the effect

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* The clause from which the quoted language is taken reads as follows:

> " . . .; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; . . ."

is to "unduly prejudice" a connecting railroad. It is appellants' contention that the amount of unrouted traffic here involved was so slight that *undue* prejudice could not result. The record indicates that practically all of the traffic here involved is routed by the shipper. The testimony in 1922 in the *Control* case was that "between 96% and 98% of all the transcontinental traffic is actually routed by the shipper himself." (Tr. 64, 3925) With increasing competition for traffic it is likely that today the volume of unrouted traffic is an even lesser percentage. In 1957 the Commission in *Toledo, P. & W. R. Co. Control,* 295 I.C.C. 523, 536 (1957), sustained *sub nom. Minneapolis & St. L. Ry.* v. *New York, Chicago & St. L. R.R.,* 165 F. Supp. 893 (D. Minn. 1958), *aff'd,* 361 U.S. 173 (1959), found that "all but a very small part of the Nation's traffic is routed by the shipper".

The Commission ignored appellants' argument and held that the preferential routing provision of the 1924 agreement is prohibited by Section 3(4). The court below, however, in one sense, recognized the validity of the approach urged by appellants. (p. 27a) The court nonetheless found that Section 3(4) was being violated because the 1924 agreement requires preferential solicitation as well as preferential routing. This may well be the most astounding feature of the court's decision. Preferential solicitation is, as the court recognized (pp. 29a-30a), a common industry practice. Yet in the 48 years since Section 3(4) was enacted it has never been suggested by the Commission or any court that Section 3(4) applied to preferential solicitation.*

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* In the 1966 report the Commission condemned the preferential solicitation provision of the 1924 agreement solely on the basis of the National Transportation Policy. Since the Commission had not relied on Section 3(4), the issue of its applicability to preferential solicitation was not treated by appellants in their briefs or oral argument in the court below.

On the basis of language alone, it would seem clear that the statute excludes preferential solicitation. Section 3(4) is applicable only to "traffic not specifically routed by the shipper". Yet the purpose of preferential solicitation is to secure shipper routing which thereby takes the traffic out of the category of "traffic not specifically routed".

The court below ignored the language of Section 3(4) and supported its construction by determining that, in effect, preferential routing and preferential solicitation are in substance the same thing:

> "In view of the clear policy expressed by the statute, we see no meaningful distinction between arbitrarily soliciting the unrouted freight at that time and arbitrarily routing it should the shipper leave it unrouted." (p. 28a)

It is apparent that the court overlooked the basic substantive difference between solicitation and routing. This difference is best seen by an analysis of the two activities from the standpoint of a competing carrier. If a shipper should deliver to SP unrouted traffic SP would (if the origin and destination were within the specified territories), under the 1924 agreement, route the traffic so that beginning at Ogden, it would go via UP. As to such traffic—since it has already been delivered to the originating carrier—another railroad such as DRG cannot compete therefor by asking the shipper to route the traffic via DRG at Ogden.

With respect to preferential solicitation, on the other hand, a competitor such as DRG is in an entirely different situation. Solicitation relates only to traffic which the shipper has not yet delivered to the originating carrier. As to such traffic, DRG is in the same competitive posi-

tion as SP or UP. DRG is free to ask the shipper to route the traffic via CP-DRG just as SP or UP are free to ask the shipper to route the traffic via CP-UP pursuant to condition (e) and the 1924 agreement. In fact, the evidence in the instant case is that DRG by preferential solicitation of its own route, in competition with SP and UP, has acquired an increasingly large percentage of the traffic moving via the CP route. In its 1962 report the Commission found, for instance, that DRG's percentage of CP's eastbound traffic increased from 5.7% in 1923 to 30% in 1958 (317 I.C.C. at 481).

In view of the foregoing it is incomprehensible how the court below could characterize preferential solicitation as a circumvention of the Act and an attempt by a carrier "to accomplish indirectly what he cannot do by direct preferential routing" (p. 28a). Such a conclusion can be reached only by ignoring the fundamental competitive difference between solicitation and routing and by ignoring the fact that during the entire period here involved, competition has increased rather than diminished.

The court below, in extending Section 3(4) to embrace preferential solicitation as well as preferential routing, did not indicate that every preferential solicitation agreement is unlawful. Instead, the court suggested that preferential solicitation might be lawful where "special circumstances" were involved. (p. 29a) The court proposed this broad exception in recognition of the fact that the Commission has required preferential solicitation agreements or referred approvingly thereto. It would seem, however, that if Congress had intended, as the court believes, to prohibit preferential solicitation, it would not have contemplated such an indefinite exception or that it could constitutionally do so.

Conclusion

For the foregoing reasons, probable jurisdiction of this appeal should be noted and the case set down for full hearing on the merits.

Respectfully submitted,

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